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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellant*,

v.

JUAN ALBERTO AVILA, *Appellee*.

No. 1 CA-CR 16-0215

FILED 10-25-16

AMENDED PER ORDER FILED 10-25-16

Appeal from the Superior Court in Yuma County

No. S1400CR201500939

The Honorable Lisa W. Bleich, Judge *Pro Tempore*

VACATED IN PART AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Patricia K. Norris and Judge Margaret H. Downie joined.

T H U M M A, Judge:

¶1 The State of Arizona appeals from an order granting defendant Juan Avila’s motion to suppress items seized in a warrantless search of his car. The State argues the warrantless search was proper because an investigatory stop not challenged by Avila almost immediately transformed into a lawful warrantless arrest based on probable cause, and the resulting search was therefore incident to a lawful arrest. Because probable cause existed to arrest Avila before the search, the superior court’s contrary finding is vacated. But because the record is unclear whether that court found Avila was under arrest when or soon after probable cause existed, this matter is remanded for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 In August 2015, a male fitting Avila’s description wearing an Adidas beanie entered a Circle K in Yuma and robbed the cashier with a shotgun. Police officers obtained surveillance videos of the incident from Circle K, a nearby jewelry store and a nearby residence. From those videos, officers captured still images of the suspect and the suspect’s vehicle (a dark Kia Sorrento), which were then disseminated to law enforcement via a be-on-the-lookout email (BOLO).

¶3 A few days later, at 3:25 a.m., a patrol officer in a marked patrol car saw Avila driving a dark Kia Sorrento in an evasive manner after “look[ing] directly at” the officer. Avila and the dark Kia Sorrento matched the description and pictures the officer had seen when looking at the BOLO. The officer then activated the lights on his patrol car, which activated a “dash cam” in the patrol car that recorded video and some audio of the subsequent interaction with Avila. Avila pulled into the parking lot of a donut shop and quickly rolled up his windows, got out of his car, locked the doors and walked toward the officer. The stop occurred at 3:33 a.m.

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¶4 The officer, who testified that Avila’s conduct when pulled over was suspicious, called for backup and requested the pictures from the BOLO. At approximately 3:35 a.m., a second officer arrived, patted Avila down and told him to sit on the curb while the officer stood by him. At that point, the first officer later testified, Avila was not free to leave. By 3:37 a.m., a third officer arrived with the BOLO pictures.

¶5 The first officer then immediately compared Avila and his dark Kia Sorrento with the BOLO pictures and determined Avila looked “just like [the suspect].” This first officer noted several distinctive characteristics of Avila’s dark Kia Sorrento that matched the BOLO pictures of the vehicle used in the armed robbery, such as mismatched rims and a white sticker in the same spot. When asked how certain he was that Avila and the dark Kia Sorrento were in the BOLO pictures, this first officer testified he “was positive” and was one “[h]undred percent” certain Avila was the person in the BOLO pictures. That testimony was consistent with this officer’s statement, recorded on the “dash cam” during the stop, that Avila and his car “definitely look[ed] like the guy and the car,” Avila looked “just like the guy” and they “match[ed] up way too perfectly for it not to be him.” One of the other officers testified to quickly reaching these same conclusions.

¶6 At that point, a few minutes after Avila was pulled over, the first officer considered Avila under arrest. The first officer did not, however, handcuff Avila at the time because “[h]e wasn’t any type of threat [to] me at the time. He was cooperating with us.”¹

¶7 When contacted by the first officer over the radio at 3:45 a.m., a supervisor who was not at the scene said to the first officer there’s “not enough to arrest” Avila.² The first officer then asked that the detective assigned to the robbery investigation be called to the scene. The first officer also asked that a K-9 unit be called based on Avila’s suspicious behavior.

¹ Nor was Avila notified of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) at that time, although there is no suggestion that he made any incriminating statements at the scene.

² Although Avila points to this statement as evidence probable cause was lacking, whether probable cause exists is based on an objective standard, not subjective beliefs of officers, including those not at the scene. *See State v. Dessureault*, 104 Ariz. 380, 386 (1969) (citing cases).

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¶8 The K-9 unit arrived at 4:00 a.m. and Avila consented to an exterior sniff of his Kia Sorrento. The detective arrived sometime between 4:05 and 4:15 a.m. At 4:14 a.m., the K-9 alerted to Avila’s Kia Sorrento for the presence of drugs. Avila, however, refused to give his keys to officers to search the car. He was then handcuffed and the officers took the key to the vehicle from his pants pocket.

¶9 Using the key, the officers unlocked and searched the Kia Sorrento and found a shotgun matching the one used in the armed robbery and an Adidas beanie. At that point, the officers stopped the search, secured the vehicle and obtained a search warrant to search the Kia Sorrento. The search pursuant to the warrant resulted in the seizure of the shotgun and beanie; notwithstanding the K-9’s alert, no drugs were located in the Kia Sorrento.

¶10 Avila was charged with armed robbery, misconduct involving weapons and aggravated assault. Relying primarily on *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), Avila moved to suppress the shotgun and beanie on the grounds that they were obtained through an illegally prolonged investigatory stop. After an evidentiary hearing, the superior court granted the motion to suppress, addressing two issues. The court concluded that the first officer had “reasonable suspicion for an investigatory stop” because he “had an objective basis for suspecting that . . . [Avila] was engaged in criminal activity.” That finding is not challenged on appeal.

¶11 The court then concluded that Avila “was not under arrest based on probable cause at the time of the stop or the time . . . [the first officer] reviewed the robbery photos. Probable cause did not exist until after the K-9 alerted.” Concluding Avila’s detention “exceeded the scope of the stop and therefore was a violation of the Fourth Amendment,” the court granted Avila’s motion to suppress the gun and beanie. The State then successfully moved to dismiss the charges without prejudice and timely filed this appeal. This court has jurisdiction over this appeal pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and -4032(6) (2016).³

³ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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DISCUSSION

¶12 The State claims the superior court erred by: (1) concluding Avila “was not under arrest based on probable cause at the time . . . [the first officer] viewed the photographs” at about 3:37 a.m. because “[p]robable cause did not exist until after the canine alerted to the vehicle” at about 4:14 a.m.; (2) making and failing to make certain findings of fact; and (3) failing to find the gun and beanie “would have been inevitably discovered through lawful means.”

¶13 The superior court’s finding Avila “was not under arrest based on probable cause” at the time of the stop or the time the officer reviewed the BOLO pictures makes it uncertain whether the court was finding probable cause did not exist at that time, or whether Avila was not under arrest at that time, or both.⁴ In the next sentence of its ruling, however, the court found that probable cause did not exist until after the K-9 alerted. Because this indicates the court’s concern was a lack of probable cause, as opposed to that Avila had not been arrested, this court examines the probable cause determination.

¶14 The superior court’s grant of Avila’s motion to suppress presented a mixed question of law and fact, which this court reviews de novo. *State v. Soto*, 195 Ariz. 429, 430 ¶ 7 (App. 1999). Whether probable cause exists is a legal issue that this court reviews de novo. *See State v. Blackmore*, 186 Ariz. 630, 632 (1996); *see also Ornelas v. United States*, 517 U.S. 690, 699 (1996) (generally, “determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal”).

To be lawful a warrantless arrest must be based on probable cause. The arresting officers must have probable cause to believe a felony has been committed and that the person to be arrested committed it. A.R.S. § 13-3883. Probable cause exists when the facts and circumstances known at the time of the arrest are sufficient to lead a reasonable person to believe a felony was committed by the person to be arrested.

⁴ The briefs on appeal do not help resolve this uncertainty; the State’s brief focuses on when probable cause existed and Avila’s brief focuses on when he was arrested.

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State v. Hein, 138 Ariz. 360, 373 (1983) (citing *State v. Sardo*, 112 Ariz. 509, 515 (1975)). “Probable cause derives from ‘reasonably trustworthy information and circumstances [that] would lead a person of reasonable caution to believe that a suspect has committed an offense.’” *State v. Keener*, 206 Ariz. 29, 32 ¶ 15 (App. 2003) (citation omitted). Information is reasonably trustworthy when it comes from official sources, including other police departments and, by implication, officers. *Keener*, 206 Ariz. at 32 ¶ 15. Whether probable cause exists depends on all of the facts and circumstances known at the time, including “the collective knowledge of all of the officers involved in the case.” *Keener*, 206 Ariz. at 32 ¶ 15

¶15 By no later than when the first officer reviewed the BOLO pictures at approximately 3:37 a.m., about four minutes after the stop, the first officer positively identified Avila and his dark Kia Sorrento as looking “just like” what he recalled the BOLO indicated; Avila had properly been stopped and acted erratically in interacting with the first officer; the first officer noted several distinctive characteristics of Avila’s dark Kia Sorrento that matched his recollection of the BOLO and, after he reviewed the BOLO pictures, he “was positive” and one “[h]undred percent” certain that Avila was the robbery suspect. Arizona courts consistently have held that such positive identification constitutes probable cause for a warrantless arrest. See *State v. Dixon*, 153 Ariz. 151, 153 (1987) (affirming probable cause for warrantless arrest when suspect “closely matched the victim’s description, except for his T-shirt which was white and a four-inch difference in height”); *State v. Baker*, 26 Ariz. App. 255, 258 (1976) (affirming probable cause for warrantless arrest when suspect “and his car answered the police bulletin’s description of the armed kidnapping suspect”); *State v. Williams*, 104 Ariz. 319, 321-22 (1969) (affirming probable cause for warrantless arrest where “[t]he arresting officers obtained their information from police authorities in Lordsburg, New Mexico who, in turn, received the information from authorities in Arizona.”); *State v. Roman*, 21 Ariz. App. 267, 268 (1974) (“Considering the information available to the police broadcast and how closely the police bulletin description matched the automobile stopped, we find that the officer’s suspicion of guilt was sufficiently well-grounded to constitute probable cause to search.”); *State v. Snyder*, 12 Ariz. App. 103, 105 (1970) (affirming probable cause for warrantless arrest based on wanted poster where facts “indicate there was probable cause to believe the defendant was the same man whose picture appeared in the wanted bulletin”).

¶16 As applied, by the time the first officer had reviewed BOLO pictures at about 3:37 a.m., police had probable cause to believe Avila committed the robbery. See A.R.S. § 13-3883(A)(1). Accordingly, the finding

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that probable cause did not exist until the K-9 alerted at approximately 4:14 a.m. was error.

¶17 It is true, as Avila claims, that credibility assessments can impact a probable cause determination. *See Reams v. City of Tucson*, 145 Ariz. 340, 344 (App. 1985). Here, however, there is no suggestion that the superior court based its ruling on a credibility assessment. This is particularly true where the first officer's testimony was corroborated by a contemporaneous video recording of the events as they happened on the night Avila was stopped and arrested.

¶18 Although probable cause for Avila's arrest existed by 3:37 a.m., it remains uncertain whether the superior court found Avila was under arrest by that time. Given this uncertainty, and given the importance of having the superior court determine that issue in the first instance, this matter is remanded for that court to determine, in light of this probable cause determination, when Avila was under arrest and any issues implicated by that determination as they relate to the motion to suppress, including whether the search was incident to a lawful arrest and, if applicable, whether inevitable discovery would justify the search.

CONCLUSION

¶19 The probable cause determination is vacated as set forth above and this matter is remanded for further proceedings consistent with this opinion.

